August 14, 2017

Hon. Rick Perry
Secretary of Energy
U.S. Department of Energy
1000 Independence Ave., S.W.
Washington D.C. 20585

Catherine Jereza
Deputy Assistant Secretary
Office of Electricity Delivery and Energy Reliability
U.S. Department of Energy
1000 Independence Ave., S.W.
Washington D.C. 20585

Dear Secretary Perry and Deputy Assistant Secretary Jereza:

Enclosed please find Sierra Club's Response to the Motion of Virginia Electric and Power Company to Strike the Procedurally Deficient Petition for Rehearing, Or, In the Alternative, Motion for Leave to Answer and Answer of Virginia Electric And Power Company, which was filed on August 1, 2017.

Sincerely,

Casey Roberts
Sierra Club Environmental Law Program

cc: Steven J. Pincus
Associate General Counsel

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UNITED STATES DEPARTMENT OF ENERGY

PJM Interconnection, L.L.C. Request for Emergency Order Pursuant to Section 202(c) of the Federal Power Act	)	Order No. 202-17-2

SIERRA CLUB'S RESPONSE TO VIRGINIA ELECTRIC AND POWER COMPANY'S MOTION TO STRIKE

Dominion Energy Virginia asserts that Sierra Club's petition for rehearing should be stricken as procedurally defective because Sierra Club does not assert that it is aggrieved by Order No. 202-17-2. Motion of Virginia Electric and Power Company to Strike the Procedurally Deficient Petition for Rehearing, Or, In the Alternative, Motion for Leave to Answer and Answer of Virginia Electric and Power Company at 2-5 ("Dominion Mot."). The Department of Energy ("Department") should deny the motion to strike, which seeks dismissal of the Club's petition on a meritless and formalistic ground.

On August 11, 2017, the Department granted the Sierra Club's petition for rehearing. Order Granting Rehearing for Further Reconsideration, Order 202-17-3. Nevertheless, Sierra Club submits this response to address Dominion Energy Virginia's argument that the Sierra Club's motion was defective, since the Department may still be reviewing that issue on reconsideration. Sierra Club also anticipates filing within one week a motion for leave to respond to the answers filed by Dominion Energy Virginia and PJM Interconnection, LLC.

Contrary to Dominion's assertion, Section 313(b), 16 U.S.C. §825l, does not establish a technical pleading requirement for rehearing petitions, that is, a requirement that a prospective party must invoke particular magic words in order to have their petition for rehearing considered. The question of whether a party is aggrieved is fundamentally about whether a party has a right to participate in a proceeding. Sierra Club's petition described in detail its interests in this proceeding, Sierra Club's Motion to Intervene and Petition for Rehearing at 1, 3-4 ("Sierra Club Pet."), which underlie its right to participate generally and its right to seek rehearing. *See* 18 C.F.R. §385.215 (requiring party seeking intervention to "state the movant's interest in sufficient detail to demonstrate that ... [t]he movant has ... an interest

which may be directly affected by the outcome of the proceeding").[1] It would make no sense to require a party seeking to intervene in a proceeding and seeking rehearing to include redundant recitations of their interests. Notably, Dominion cites to no example of the Department or the Federal Energy Regulatory Commission rejecting a petition for rehearing where a party stated facts showing a demonstrated interest in the proceeding but failed to use the word "aggrieved" in describing their interest.

The Federal Power Act establishes that "[a]ny person . . . aggrieved by an order issued by the Commission in a proceeding under this chapter to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order." 16 U.S.C. §825l(a) [FPA §313(a)]. In the following subsection, FPA §313(b), the FPA allows that a person aggrieved by an order of the Commission upon rehearing may seek judicial review.

Federal courts have widely held that for the purposes of section 313(b), "[p]arties are 'aggrieved' . . . if they satisfy both the constitutional and prudential requirements for standing." *Wabash Valley Power Ass'n, Inc. v. FERC*, 268 F.3d 1105, 1112 (D.C. Cir. 2001); *see also CNG Transmission Corp. v. FERC*, 40 F.3d 1289, 1292 (D.C. Cir. 1994) ("To show aggrievement, a plaintiff must allege facts sufficient to prove the existence of a concrete, perceptible harm of a real, non-speculative nature.") (quoting *North Carolina Util. Comm'n v. FERC*, 653 F.2d 655, 662 (D.C. Cir. 1981)). Similarly, FERC has explained that "[t]o be aggrieved, a party must establish a concrete injury arising from the Commission's underlying action." *NextEra Energy Res. v. ISO New England, Inc.*, 157 FERC ¶ 61,059 at P 5 (2016) (quoting *Confederated Salish & Kootenai Tribes Energy Keepers, Inc.*, 153 FERC ¶ 61,217, at P 7 (2015)).

Thus, the Federal Power Act's requirement that only aggrieved parties may petition for rehearing of an order is intended to ensure that the party is sufficiently interested in the matter, akin to constitutional or jurisprudential standing principles. Neither the Act, nor common sense, suggests that such an interest depends upon a party's invocation of the word "aggrieved." Sierra Club's motion and petition includes a detailed explanation of its interest in the matter, demonstrating that it is an aggrieved party, and therefore entitled to seek reconsideration pursuant to section 313(a) of the Act.

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[1] The Department has no regulations governing review of its emergency orders under Section 202(c), so the only pertinent requirements are statutory. However, to the extent that DOE has indicated informally that it looks to FERC's regulations and practice regarding petitions for rehearing for guidance, Sierra Club has cited to the relevant FERC regulations.

Dominion's motion briefly asserts that Sierra Club's motion does not "state facts that would amount to it being an aggrieved party," Dominion Mot. at 3, but fails to offer any specific rebuttal to the Club's statements showing that it has a concrete injury arising from the Commission's action—namely, the risk to its members' health resulting from toxic air emissions from the Yorktown plant.

Sierra Club made the following assertions in its July 14, 2017 filing that demonstrate that it and its members are aggrieved by Order No. 202-17-2:[2]

- Sierra Club Pet. at 1: "Sierra Club seeks to intervene in order to protect its interests in reducing the pollution authorized by Order No. 202-17-2, as well as the consequent costs to consumers."
- Sierra Club Pet. at 3-4: "Sierra Club and its members have an interest in the Order. Sierra Club members are affected by the pollution that will be produced by operations required by the Order. As of May 2017, over 20,200 Club members reside in Virginia; approximately 265 of those members reside in the general vicinity of the Yorktown plant. Sierra Club members also fish in lakes and rivers that will be affected by pollution (including mercury pollution) from that plant. Sierra Club members are, furthermore, ratepayers who may be subject to increased costs as a result of the Department's Order."

Because Sierra Club members will be directly affected by the dangerous levels of toxic air pollutants emitted by Yorktown pursuant to the Order, either by breathing in those pollutants or by recreating or fishing in waters where those pollutants have deposited, they are aggrieved by the Order. *See Scenic Hudson Preservation Conference v. Fed. Power Comm'n*, 354 F.2d 608, 616 (2d Cir. 1965) (holding that those who exhibit recreational, aesthetic, or conservational interests in areas affected by power development are "included in the class of 'aggrieved' parties under § 313(b)"); *State of Washington Dep't of Game v. Federal Power Comm'n*, 207 F.2d 391, 395 n.11 (9th Cir. 1953) ("All are 'parties aggrieved' since they claim that the Cowlitz Project will destroy fish in which they, among others, are interested in protecting.").

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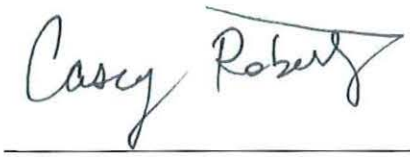
[2] Although Sierra Club maintains that the facts asserted in its July 14, 2017 petition are more than sufficient to support a finding that it is aggrieved by Order 202-17-2, we stand ready to submit additional evidence should the Department have questions regarding the nature of the harms to the Sierra Club and its members and how those harms relate to Order 202-17-2.

In addition, Sierra Club's petition notes that it has members who are ratepayers that may be subject to increased costs as a result of the Order. Customers are widely recognized as persons aggrieved by orders that result in increased costs. *See, e.g., Utility Users League v. Federal Power Comm'n*, 394 F.2d 16, 19 (7th Cir. 1968) ("Consumers have been found to be 'aggrieved persons,' entitled to obtain judicial review" where the petitioner "makes substantial factual allegations that the challenged agency decision was detrimental to him.").

In sum, the single argument upon which Dominion's motion rests turns the case law on its head; that law requires a petitioner to show aggrievement, not to mechanically recite the precise language of section 313(a) or (b). *See, e.g., id.* at 19 (holding that "[a] party seeking judicial review cannot rest on the mere allegation that he is 'aggrieved.' He must make a preliminary showing of aggrievement."). Here Sierra Club made a preliminary showing of aggrievement in its July 14, 2017 petition by describing the health and economic harm to its members that will result from the operation of Yorktown units 1 and 2 as authorized by Order 202-17-2. There is no basis in the law for rejection of a petition for reconsideration for failure to use the word aggrieved, especially one in which the petitioner nevertheless details their interest in the matter.[3] Nor has Dominion cited any such decision.

Respectfully submitted on August 14th, 2017 by:



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[3] FERC's rules specify the contents of a petition for reconsideration, 18 C.F.R. §385.713(c), and make no mention of a requirement to state that the petitioner is aggrieved. By contrast, FERC's rule on intervention specifically states that the motion "must also state the movant's interest in sufficient factual detail to demonstrate that: (i) The movant has a right to participate which is expressly conferred by statute or by Commission rule, order, or other action; (ii) The movant has or represents an interest which may be directly affected by the outcome of the proceeding . . . ." *Id.* §385.214(c).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy and correct copy of the foregoing was served via U.S. Mail on this 14th day of August, 2017 on:

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